No. 82-782

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In The

Supreme Court of the United States

October Term, 1982

EDWARD J. OLSEN, JR., an Incompetent by MARGARET A. OLSEN, his Guardian, and MARGARET A. OLSEN, in her own right,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court of appeals may, without written opinion and explanation, affirm a district court opinion which disregards the settled law of its own circuit and the overwhelming majority of other circuits on a question on which it is desirable to have national uniformity?

2. Whether a federal court of appeals may, without written opinion and explanation, affirm a district court opinion, which is at variance with the vast majority of federal courts on a question of interpretation of one of the Federal Rules of Evidence?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were as follows: Edward J. Olsen, Jr., an Incompetent by Margaret A. Olsen, his Guardian and Margaret A. Olsen, in her own right, appellants; Ford Motor Company, a corporation, appellee; Timothy D. Cooper, additional defendant; United States of America, plaintiff-intervenor.

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No.

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Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The above named petitioners respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered on June 28, 1982, affirming the opinion of the United States District Court for the Eastern District of Pennsylvania, Honorable Lewis Bechtle, J., denying petitioner's motion for a new trial.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit entered a judgment order without opinion on June 28, 1982 (*see* Appendix, *infra* at 3a). The court subsequently denied petitioners' petition for rehearing on July 27, 1982 (1a). The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 521 F. Supp. 59 (E.D. Pa. 1981) (5a).

JURISDICTION

As indicated immediately above, the order of the United States Court of Appeals for the Third Circuit was entered on June 28, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved herein are 15 U.S.C. §1381 and 15 U.S.C. §1901.

STATEMENT OF THE CASE

This case is a personal injury action which was instituted in the United States District Court for the Eastern District of Pennsylvania. The jurisdiction of that court was founded upon diversity of citizenship between the parties.

The case arose from an accident which took place near the town of Hartsville, Indiana, on September 10, 1977, at which time petitioner Edward J. Olsen, Jr. was a passenger in a 1972 Ford Pinto automobile. The automobile was involved in a one vehicle accident in the early morning hours when the driver attempted to avoid an animal on the highway and rolled over several times. Petitioner Edward Olsen, age 27, suffered severe

injuries which left him permanently triplegic and virtually incompetent. The action was pursued by petitioner Margaret A. Olsen, his wife, as her husband's guardian and in her own right.

During the trial, petitioners offered into evidence portions of a deposition of the town marshal of Hartsville, taken for use at trial by respondent. The witness in question arrived at the accident scene about ten minutes after the occurrence, and was the first person not involved in the accident to come to the scene. The trial court struck from the deposition testimony of this officer that persons at the scene had told him that petitioner Edward Olsen had to be pulled from the car. Respondent strenuously contended at trial that petitioner had been ejected from the vehicle and thus was in effect not subject to the "second collision" or "crashworthiness" doctrine, which will be explained immediately below. This testimony had been offered to show that petitioner Edward Olsen had not been ejected from the car while it was rolling over and before it came to rest.

At the conclusion of the trial, the court refused petitioner's points for charge 2, 3, and 4, which are reprinted in full as an appendix to this petition (26a). These points reflected the law of several circuit courts of appeal, including the Third Circuit itself, which have approved charges which tailor products liability law specifically towards automobile accident cases in which the adequacy of the design, testing, and construction of the automobile is placed in issue. This special formulation of product liability law has been variously referred to as the "second collision" doctrine or the "crashworthiness" doctrine. "Second collision" refers to the collision of the passenger with an interior portion of the vehicle, while "crashworthiness" means decisional law which holds that a motor vehicle is more than a mere transportation container, and that it must provide reasonably safe temporary housing for its occupants.

The trial court refused the above cited requests for charge to the jury. Its charge on the design, testing, and construction of the accident vehicle was couched in the language of standard products liability. The eight-person jury rendered a verdict in favor of respondent. Petitioners filed a post verdict motion for a new trial, which was denied. An appeal was timely taken to the United States Court of Appeals for the Third Circuit in which, *inter alia*, the above points were assigned as error. The United States Court of Appeals entered a judgment order without opinion affirming the trial court, which opinion was dated June 28, 1982. Petitioners filed a petition for rehearing, which was denied in an order dated July 27, 1982.

REASONS FOR GRANTING THE WRIT

I.

In affirming without opinion the decision of the lower court, wherein the district court refused to charge on the so-called "crashworthiness" and "second collision" doctrines, the Court of Appeals for the Third Circuit in effect abandoned those doctrines for its circuit. The Third Circuit thus squarely placed itself in conflict with every other United States court of appeals which has considered the question. The seminal case was *Larson v. General Motors Corporation*, 391 F. 2d 495 (8th Cir. 1968). In *Larson*, the Eighth Circuit adopted the "second collision" and "crashworthiness" doctrines, saying, "the sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art. . . [the automobile] manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision" 391 F. 2d at 502, and "we perceive of no sound reason, either in logic or experience, nor any command in precedent, why the

manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents. The manufacturers are not insurers but should be held to a standard of reasonable care and design to provide a reasonably safe vehicle in which to travel. . . the unreasonable risk should be eliminated and reasonable steps in design taken to minimize the injury-producing effect of impact." 391 F. 2d at 503. These quotations are the essence of the second collision and crashworthiness doctrines. These principles have subsequently been adopted by every United States court of appeals to consider the issue. *Dreisonstok v. Volkswagenwerk*, 489 F. 2d 1066 (4th Cir. 1974); *Polk v. Ford Motor Co.*, 529 F. 2d 259 (8th Cir. 1976); *Huff v. White Motor Corp.*, 565 F. 2d 104 (7th Cir. 1977); *Knippen v. Ford Motor Co.*, 546 F. 2d 993 (D.C. Cir. 1976); *Nanda v. Ford Motor Co.*, 509 F. 2d 213 (7th Cir. 1974); *Passwaters v. General Motors Corp.*, 454 F. 2d 1270 (8th Cir. 1972); *Wooten v. White Trucks*, 514 F. 2d 634 (5th Cir. 1975); *Perez v. Ford Motor Co.*, 497 F. 2d 82 (5th Cir. 1974). These precepts have also been adopted by the same court of appeals to which this Court is asked to direct a writ of certiorari. *Huddell v. Levin*, 537 F. 2d 726 (3rd Cir. 1976); *Seese v. Volkswagenwerk A.G.*, 648 F. 2d 833 (3rd Cir. 1981). In *Huff*, the Seventh Circuit Court of Appeals overruled its prior case which had declined to adopt the second collision and crashworthiness principles, *Evans v. General Motors Corp.*, 359 F. 2d 822 (7th Cir. 1966). In an appendix, the Seventh Circuit noted thirty jurisdictions which followed these doctrines as of the date of the decision in 1977, and only three which did not. 565 F. 2d at 110-111.

The affirmance without opinion of the decision of the United States District Court for the Eastern District of Pennsylvania thus places the United States Court of Appeals for the Third Circuit in a conflict with the majority of other circuits, and indeed with its own prior decisions, which is both real and embarrassing. For this reason, a writ of certiorari should issue. *N.L.R.B. v.*

Pittsburgh SS Co., 340 U.S. 498, 71 Sup. Ct. 453 (1951); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 Sup. Ct. 614 (1955). Petitioners recognize that since the decision of this Court in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), writs of certiorari to resolve conflicts of United States courts of appeals in diversity cases are uncommon, since such conflicts may merely reflect differences in state law. *See, e.g., Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 58 Sup. Ct. 860 (1938). There are, however, at least two principal reasons why such considerations do not apply in the pending case, and why the issuance of a writ of certiorari to resolve the real and embarrassing conflict among circuits is appropriate. First, although the early cases such as *Larson* were decided on negligence counts, the majority of the later cases have proceeded also under the strict liability provisions of §402(a) of the Restatement of Torts. The Third Circuit Court of Appeals in *Seese* found the state of acceptance of that section in the state courts to be as follows:

> "In 1965, the *Restatement of Torts, 2d* was promulgated and from that time until the District Courts decision in this case, 45 states adopted the principle of strict liability in substantially the form described in §402(a) of the Restatement. Moreover, during that period, no State Supreme Court ever rejected the strict liability theory." 648 F. 2d at 836 (emphasis in original).

Thus, state law on the applicability of Restatement of Torts, 2d §402(a) to automobile bodies and their crashworthiness proceed from a common base, and there is therefore no reason why federal court decisions in diversity cases should reach divergent results. Where they do, as here, it is appropriate for this Court to utilize its powers of certiorari to resolve the conflict. Such a course would insure that the lower federal courts are following the mandate set down by this Court in *Erie Railroad v. Tompkins, supra*, and

are not without justification departing from state substantive law. Insuring the *Erie Railroad* is being followed promotes the true purpose of the United States district court sitting in diversity and discourages forum shopping on the part of litigants whose sole access to the federal court is on the grounds of diversity.

A second and even stronger reason supports the grant of certiorari in this case. On several occasions, the United States Congress has expressed as a matter of national policy the goal of reducing both injuries and deaths from traffic accidents and in reducing the economic loss resulting from motor vehicle damage in such accidents. *See, e.g.*, the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1381, *et seq.* and the Motor Vehicle Information and Costs Savings Act, 15 U.S.C. §1901, *et seq.* As cooperative and coequal partners in the federal system of government, the federal courts have a role to play in helping to effectuate congressional policy as stated in these and other statutory enactments. It furthers these congressional policies for federal courts to announce uniform standards for automobile accident diversity cases. Of course, under *Erie Railroad v. Tompkins, supra,* due regard must be had for divergencies in underlying state law. Where, as here, however, virtually all states proceed from the same substantive base, *i.e.*, §402(a) of the 2d Restatement of Torts, there can be little if any justification for difference in standards in the federal courts. In *Dawson v. Chrysler Corp., et al.*, 630 F. 2d 950 (1980), the Third Circuit itself, speaking through Circuit Judge Adams, spoke to this point in *obiter dicta.* Citing the National Traffic and Motor Vehicle Safety Act of 1966, the court stated the following regarding automobile accident diversity cases:

> "In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile manufacturers conflicting requirements. It would be difficult for members

of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents.

Equally serious is the impact on other national social and economic goals of the existing case-by-case system of establishing automobile safety requirements. As we have become more dependent on foreign sources of energy, and as the price of that energy has increased, the attention of the federal government has been drawn to a search to find alternative supplies and the means of conserving energy. More recently, the domestic automobile industry has been struggling to compete with foreign manufacturers which have stressed smaller, more fuel-efficient cars. Yet, during this same period, Congress has permitted a system of regulation by ad hoc adjudications under which a jury can hold an automobile manufacturer culpable for not producing a car that is considerably heavier, and likely to have less fuel efficiency.

In sum, this appeal has brought to our attention an important conflict that implicates broad national concerns. Although it is important that society devise a proper system for compensating those injured in automobile collisions, it is not at all clear that the present arrangement of permitting individual injuries, under varying standards of

> liability, to impose this obligation on manufacturers is fair or efficient."

Yet, in affirming without opinion the decision of the United States District Court for the Eastern District of Pennsylvania in this case, the Third Circuit in effect is promoting, or at the very least is permitting, precisely that type of situation it warned against in *Dawson* — regulation by ad hoc, and frequently inconsistent, adjudication.

The goal of uniform national regulation envisioned by the Third Circuit in *Dawson* is attainable. The *Dawson* court felt that it was a problem to be addressed by the Congress, but petitioners submit that the courts, as coequal branches of the federal system, need not sit idly by awaiting action by the Congress. They can act to prevent ad hoc inconsistent regulation by jury verdict by promoting a uniformity in the charges given to juries. In the present context, that policy would be promoted by granting the writ of certiorari to the United States Court of Appeals for the Third Circuit and reversing that court's affirmance of the lower court without opinion, in the face of the overwhelming weight of the decisions in the other circuits and indeed of its own prior opinions.

II.

An additional reason exists for the granting of the writ of certiorari in the present case. Petitioners proffered certain testimony of Roger Holley, town marshal of the town of Hartsville, Indiana, concerning what persons at the scene of the accident had told him regarding the pulling of petitioner Olsen out of the vehicle. The testimony, which admittedly is traditional hearsay, was proffered under an exception to the hearsay rule which has become known as the "excited utterance" exception and which is codified in Rule 803(2), Federal Rules of Evidence. The Federal

Rules of Evidence took effect in the federal courts in July of 1975, and had as their purpose the promoting of uniformity in evidentiary rulings in the federal court system. Since that date, the other courts of appeals which have considered this exception to the hearsay rule have adopted it under circumstances similar to those which prevailed in this case. *United States v. Napier,* 518 F. 2d 316 (9th Cir. 1975); *Hilyer v. Howat Concrete Co.,* 188 App. D.C. 180, 578 F. 2d 422 (1978); *United States v. Nick,* 604 F. 2d 1199 (9th Cir. 1979); *United States v. Boyd,* 620 F. 2d 129 (6th Cir. 1980); *United States v. Iron Shell,* 633 F. 2d 77 (8th Cir. 1980); *United States v. Bowdach,* 561 F. 2d 1160 (5th Cir. 1977), *affirming,* 414 F. Supp. 1346 (S.D. Fla. 1976), *rehearing denied,* 565 F. 2d 163. The *Hilyer* case is almost exactly on point with the case at bar, involving as it did a statement given by a decedent's coworker to a policeman who arrived at the scene soon after the accident occurred.

In affirming without opinion the decision of the district court, the Third Circuit Court of Appeals in effect annuls Federal Rule of Evidence 803(2) in this circuit. It also places itself in a minority of one, in plain conflict with the other courts of appeals who have adopted the rule in like circumstances. For these reasons alone, there is such a real and embarrassing conflict of opinion and authority between the courts of appeals as to justify the issuance of a writ of certiorari by this Court. *N.L.R.B. v. Pittsburgh SS Co., supra.* In addition, a writ of certiorari to the Third Circuit Court of Appeals is in order to insure uniform application of the Federal Rules of Evidence in the lower federal courts.

CONCLUSION

For either of the above reasons independently or for both reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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